KUNHARDT & CO. CASE

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BAINBRIDGE, *Commissioner* (for the Commission):

Kunhardt & Co., claimants herein, are a copartnership doing business in the city of New York, and composed of Henry R. Kunhardt, George W. Kuhlke, and Franz Mueller. Kunhardt and Kuhlke are native citizens of the United States. Mueller was born in Germany in 1859, but was duly naturalized as a citizen of the United States on June 12, 1896, in the district court of the United States for the southern district of New York.

On behalf of Messrs. Kunhardt & Co. the United States presents two separate and distinct claims.

COMPAÑÍA ANÓNIMA TRASPORTES EN ENCONTRADOS

The memorial states that:

On the 24th of February, 1897, a contract was entered into by and between the minister of public works of Venezuela, J. M. Ortega Martinez, and Gen. Joaquín Valbuena U. for the construction of a wooden wharf and other works of public utility in the port of Encontrados, on the Zulia River, in the State of Zulia, Venezuela. By the said contract and in consideration of the building and maintaining of the wharf and other structures by Valbuena, the Government of Venezuela granted to Valbuena, his heirs and successors, the exclusive right for fifteen years to collect tolls from the ships or boats for loading and unloading at said port, a duty not to exceed 75 centimos for every hundred kilograms gross weight of merchandise. The grantee, his heirs or successors, were given the right of ownership over the wharf and its belongings during said term of fifteen years, upon the expiration whereof the wharf and all other works were to become the property of the nation.

The contract by its terms could be transferred to another person or company, national or foreign, with the approval of the Government of Venezuela.

This contract was ratified by the Congress and the national Executive on April 2, 1897, and published in the Gaceta Oficial.

On 15 December 1897, Valbuena, with the consent of the President of the Republic, assigned all his rights under the contract to Frederico Evaristo

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Schemel, who, on December 16, 1897, with the consent of the President of the Republic, assigned all his rights under the contract to Bernardo Tinedo Velasco.

Tinedo completed the wharf and other structures in accordance with the terms of the contract. On May 10, 1898, the department of public works appointed Victor Brigé, an engineer, to examine the work, and on July 14, 1898, Brigé reported to the Government that the wharf and other structures conformed to all the requirements of the contract, whereupon said work was accepted on behalf of the Government.

On March 14, 1899, with the approval of the national Executive in the council of ministers, the department of public works authorized Tinedo to assign all his rights under said contract to the company known as " Compañía Anónima Trasportes en Encontrados." This company was formed in Maracaibo on April 10, 1899, by an agreement entered into by Bernardo Tinedo V., Rafael Tinedo, Carlos Rodriguez, and other citizens of Maracaibo, for the purpose of assuming the rights and liabilities of the Valbuena contract. By its articles of agreement it was provided that said company should remain in existence until the expiration of the fifteen years during which the right to collect the tolls was granted to Valbuena and his successors. The capital of the company was 300,000 bolivars, divided into 400 shares of 750 bolivars each. Said shares were issued for full value to the members of said company.

On April 18, 1899, pursuant to the authorization given him by the department of public works, Tinedo, in consideration of the sum of 300,000 bolivars, conveyed to the " Compañía Anónima Trasportes en Encontrados " the wharf and other structures, together with all the rights and privileges under the contract, and said company assumed all the duties and liabilities imposed by said contract. This conveyance was registered in the office of the register of Maracaibo on April 22, 1899.

On or about July 1, 1899, Messrs. Kunhardt & Co. became the owners of an interest in the " Compañía Anónima Trasportes en Encontrados " amounting to 243,750 bolivars, represented by 325 certificates of stock, each certificate representing one share of a par value of 750 bolivars.

On November 15, 1900, the national Executive of the Republic, through the department of public works, adopted the following resolution:

> It is resolved,
>
> As the agreement entered into on the 24th of February, 1897, between the department and the citizen, Joaquín Valbuena Urquinaona, for the construction of a wharf in the port of Encontrados, has not been fulfilled in all its parts, the supreme chief of the Republic has declared said contract void.
>
> Let it be known and published.
>
> For the national Executive: J. Otañez M.

This resolution was published in the Gaceta Oficial November 16, 1900.

The memorialists allege that this resolution, whereby the Valbuena contract and concession were annulled, was without legal or other cause or justification, and wrongfully deprived the stockholders of the company, and in particular Kunhardt & Co., as owners of over three-fourths of said stock, of the property to which they were legally entitled and in which they had invested funds to the amount of 243,750 bolivars upon the faith of the promise of the Government of Venezuela as set forth in said contract and concession; that since November 15, 1900, the Venezuelan Government has prevented said company from collecting the toll to which it was and is justly entitled under the terms of the said contract and has thereby rendered worthless the wharf and other structures erected at Encontrados, and the contract and concession under which the same were built, all in contravention of the terms of said contract; that on January 19, 1901,

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the shareholders of said company, including Kunhardt & Co., protested against the action of the Executive in said attempted cancellation of the contract and in the subsequent proceedings in pursuance of said cancellation, but that the Venezuelan Government has continued to prevent the collection of the tolls and has refused to allow said company to exercise its rights under the contract.

Kunhardt & Co., claim that, by reason of said wrongful action of the Government of Venezuela, they have been damaged in the sum of 243,750 bolivars, equivalent to $ 46,875 in United States gold, being the value of their stock in the Compañía Anónima Trasportes en Encontrados prior to November 15, 1900, and they claim indemnity in that amount.

The learned counsel for Venezuela in his answer declares that this claim is unfounded in every aspect; that the corporation Trasportes en Encontrados was organized solely by citizens of Venezuela; that claimants were not in any manner interested in its organization, and that if they became the owners of various shares of stock issued by said company, it was a voluntary act on their part; that if any claim could arise against the Government of Venezuela on account of the annulment of the contract of February 24, 1897, only the managers of the company, or the receiver in case of dissolution, could institute the suit; that the claimants, taking advantage of their status as foreigners by making this claim are using an extraordinary remedy not available to the other shareholders of the company.

Article 163 of the Código de Comercio of Venezuela recognizes three kinds of mercantile companies:

(1) *La compañía en nombre colectivo*, in which all the members administer the business themselves or by means of an agent chosen by common accord. The liability of each member is unlimited. It corresponds to a general partnership.

(2) *La compañía en comandita*, in which one or more of the members are bound only to the amount of their investment. There are two kinds of companies *en comandita:* (*a*) Simple and (*b*) divided into shares. It is similar to what is known in England and the United States as a limited partnership.

(3) *La compañía anónima*, in which the capital is managed by shareholders who are responsible only to the value of their shares. It is the legal entity known to the common law as a private corporation.

Any number of persons not less than seven may by agreement associate themselves into a " compañía anónima." No previous authorization is necessary. It is a corporation created under general charter. The law requires that the articles of agreement (contrato de sociedad), in writing, whatever the number of shareholders, must be made in duplicate, one copy of which is to be filed in the office of the register and the other in the records of the company. (Art. 195.)

The powers, capacities, and incapacities of a corporation under the civil law are similar to those under the English and American corporation law.

The Compañía Anónima Trasportes en Encontrados was organized April 10, 1899, by nine citizens of Maracaibo and its articles of agreement filed in the registry as provided by law on April 13, 1899.

The articles of agreement declare the objects and purpose of the corporation to be the acquisition of the rights and privileges granted by and the assumption of the obligations of the contract executed between the National Government and Gen. Joaquín Valbuena on February 24, 1897. The capital of the company is fixed by said articles at 300,000 bolivars. On April 18, 1899, Bernardo Tinedo Velasco, the then owner of the concession, pursuant to the authorization of the Government, duly transferred to the company all the rights and privileges

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which had been acquired by him as concessionary under said contract. The consideration of the transfer is declared to be 300,000 bolivars.

H. R. Kunhardt states in an affidavit dated May 20, 1903, that as a partner of the firm of Kunhardt & Co. he purchased on or about July 1, 1899, 325 certificates of the stock of said compañía of the par value of 750 bolivars each, amounting to 243,750 bolivars, or $ 46,875 American money; that the reasonable value of said 325 certificates on November 15, 1900, was $ 46,875, and that during the year from September 12, 1899, to September 20, 1900, the company declared and paid dividends on said stock amounting to over 10 per cent on the par value of each share of stock.

The capital of the Compañía Anónima Trasportes en Encontrados was represented by the alleged value of the contract and concession of February 24, 1897. It is claimed that the executive action of November 15, 1900, annulling the contract renders worthless the wharf and other structures erected at Encontrados and the contract and concession under which the same were built. In other words, it took away the company's capital. Paragraph 2 of article 204 of the Código de Comercio provides that when the capital of a company has been diminished two-thirds, the company is necessarily put in liquidation if the shareholders do not prefer to refund the same or limit the capital to the existing balance, provided the latter is sufficient to obtain the objects of the company. Article 42 of the reglamento of the company provided that when any of the cases expressed in paragraph 2 of article 204 of the Código de Comercio should exist the company could be dissolved.

When the capital of the corporation was practically destroyed by the taking away of that which represented it, the company was dissolved by operation of law and the by-laws above cited.

While the property of a corporation in esse belongs not to the stockholders individually or collectivity, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to the real and personal property of the corporation, as well as to its rights of contract and choses in action, are not destroyed by dissolution or liquidation. But in such case the creditors of the corporation have a right of priority of payment in preference to the stockholders.

The principal asset of the Compañía Anónima Trasportes en Encontrados was the Valbuena concession. Under it the Government of Venezuela for a consideration agreed to give the grantee, his heirs, or successors the rights and privileges therein designated for a period of fifteen years. It is fundamental that if one party to a contract wrongfully violates it he becomes liable to the other for such damages as the latter may sustain by reason of the breach, and this is true " whether such party be a private individual, a monarch, or a government of any kind." [1]

Article 691 of the civil code of Venezuela recognizes and declares that a property right may rest in contract. If the rights granted under the contract of February 24, 1897, were wrongfully taken away by the Government of Venezuela, compensation is justly due from that Government — first, to the Compañía Anónima Trasportes en Encontrados, or, second, upon the dissolution of said company, to its creditors and shareholders.

Messrs. Kunhardt & Co., as citizens of the United States and the equitable owners of their proportionate share in the property of the dissolved corporation,

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[1] See opinion of Sir Henry Strong and Hon. Don M. Dickinson in the Salvador Commercial Co. case. For. Rel. U. S., 1902, p. 871.

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have a standing before this Commission to make claim for indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession.

The claim of Kunhardt & Co. is based upon the alleged value of the concession when called as being 300,000 bolivars, and it is urged on their behalf that they have been damaged to the reasonable value of their interest in the company as measured by their ownership of 325 shares of the capital stock of a par value of 750 bolivars each, or the total value of 243,750 bolivars, equivalent to $ 46,875 in United States gold.

But the real interest of Kunhardt & Co. is an equitable right to their proportionate share of the corporate property after the creditors of the corporation have been paid. An important, and indeed, an essential element of proof to determine the actual measure of the claimant's loss is entirely wanting here. No evidence of the amount of the corporate debts is presented, although the existence of corporate indebtedness is apparent. The protest of January 19, 1901, states that:

> The prejudices are very grave which the company, its stockholders, and many others who have interest in it, suffer from the Executive resolution which declared the contract base of this company " canceled." And said protest is made on behalf of the company, its stockholders, and others connected with it.

Who but creditors of the corporation can be parties in interest to this contract other than the company and its stockholders?

The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities.

The absence of such a showing in this case renders impossible the determination of Kunhardt & Co.'s interest in the concession or the amount of loss they have sustained by its annulment. The claim must, therefore, be here disallowed, but without prejudice to the corporation, its creditors, and stockholders, or to the interest of these claimants therein.

EL MOLINO

The memorials state:

(*a*) The firm of Kunhardt & Co., are, and since September 12, 1897, have been, the owners of an estate known as " El Molino," situated in the district of Barquisimeto, State of Lara, Venezuela. Said firm invested in the purchase and improvement of this property the sum of $ 35,000. The estate was used for the raising of sugar cane and the manufacture of sugar, the raising of corn and fodder, and for pasturing milch cattle and oxen. Since June 5, 1899, the estate has been in charge of J. Adolphus Ermin, as administrator and agent of claimants, and from said date to December 22, 1899, the firm received from the estate a monthly income exceeding 400 bolivars.

On the night of December 23, 1899, certain troops of the army of General Castro, under the immediate command of General Lara, entered upon and took forcible possession of said estate and encamped thereon for some time. During this period the troops seized for rations the cattle upon the estate and foraged their horses upon the growing crops, destroying all the corn and sugar cane growing upon the estate; took for their own use the horses, donkeys, and mules which were on the estate, and upon the departure of the troops they had killed or taken away all the live stock and destroyed all the growing crops; had injured and destroyed the wire fencing and greatly damaged the sugar house and sugar machinery.

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As a direct result of the occupation of the estate by the troops of General Lara, the firm of Kunhardt & Co. sustained damages to the extent of 81,900 bolivars, equivalent to the sum of $ 15,750 in United States gold. An appraisal of the property lost and an assessment of the damages done were made by competent appraisers familiar with the property and its value. The report of said appraisers shows the loss sustained by claimants to be as follows:

	Bolivars
85 selected milch cattle, several of them American, an average of 240 bolivars each	20,400
3 teams of donkeys, with their harness, at 1,200 bolivars per team	3,600
9 mules, at 500 bolivars each	4,500
18 horses, at 500 bolivars each	9,000
Damage to the residence	8,000
3 carts and their harness, at 400 bolivars each	1,200
Damage to the wire fence	2,000
300 tares of corn fodder, at 24 bolivars each	7,200
250 tares of sugar cane, at 40 bolivars each	10,000
Injury to the engine room and loss of the zinc of the engine house	16,000
Total	81,900
Or in United States money	$ 15,750

Said appraisement was verified by the appraisers before Señor R. M. Delgado, judge of the municipal court of the city of Concepción, on April 16, 1901.

(*b*) The claimants allege that since the occupation of " El Molino " by the troops in December, 1899, as above described, the district in which said estate is situated has been in a condition of civil disturbance, which has prevented them from restocking, replanting, or in any way making use of said estate, which, it is claimed, is highly adapted to agricultural use, and except for the civil disorder which has prevailed, would be exceedingly productive; that previous to the occupation of December, 1899, the estate yielded a net annual profit of $ 924; that the Government of Venezuela has failed to suppress said condition of civil disturbance, by reason whereof claimants have lost the use and occupation of said estate to their damage, in the sum of $ 3,054.33.

(*c*) In a supplemental memorial, dated May 20, 1903, claimants allege that they have sustained further losses and damages by reason of additional depredations committed by Government troops upon said estate, " El Molino; " that in order to maintain said estate and reduce as much as possible the damages suffered in respect thereto, the agent of claimants kept on the estate a small number of milch cattle and endeavored to raise hay and corn; that during the first part of the year 1902 the Government troops destroyed all the crops on said estate and seized five milch cattle, and that on the 2d day of April, 1903, said troops seized thirteen milch cattle from said estate, to the additional injury of claimants in the sum of $ 1,407.61.

(*d*) In a supplemental memorial dated June 22, 1903, claimants filed a " justificativo " in proof of loss and damages sustained by them in respect to said estate in addition to that shown in their previous memorials, in the sum of $ 2,635.77 gold.

The entire amount claimed for injuries sustained in connection with the hacienda " El Molino " is the sum of $ 22,847.71 United States gold.

The responsibility of a government for the appropriation of neutral property in time of war has been clearly stated in Shrigley's case[1] decided by the United States and Chilean Claims Commission of 1892, as follows:

[1] Shrigley *v.* Chile, Moore's Arbitrations, p. 3712.

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(*a*) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owners of the property to demand compensation from the government exercising such authority.

(*b*) Neutral property taken or destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation, whenever the fact can be proven that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.

The evidence submitted in support of this claim satisfactorily shows that the Government troops under the immediate command of General Lara entered upon and confiscated property of the estate "El Molino" in December, 1899, and at various times thereafter. A reasonable compensation is therefore due to claimants from the Government of Venezuela for the losses thus sustained. But that portion of the claim based upon the loss of the annual profits of the estate by reason of the civil disorder which prevailed in the district does not appear to be well founded. The situation of claimants' property in that regard did not differ from that of other property within the same district, and no government is immune from the occurrence of civil commotions. There is also in the last two memorials an obvious duplication of the claim for the 13 milch cattle taken early in April, 1902. Several items of the claim appear to be excessive and the evidence of value is not wholly satisfactory.

The Commissioners have agreed upon an award in favor of Kunhardt & Co. on his branch of their claim in the sum of $ 13,947 gold coin of the United States.

PAÚL, *Commissioner*:

The United States of America presents in this case two individual claims on behalf of Kunhardt & Co. — one for the sum of $ 46,675 for damages arising from the cancellation ordered by the Government of Venezuela of a certain contract and the other for damages to the estate "El Molino" for the amount of $ 22,847.71.

The first claim is based upon the fact that Kunhardt & Co., being owners of a portion of the 400 shares stock capital of a corporation named "Trasportes en Encontrades," they consider themselves entitled to obtain directly from the Government of Venezuela the payment of damages which they allege they have suffered by the decree issued by said Government canceling the Encontrados contract.

The honorable agent for Venezuela, in his answer to this claim, maintains that the claimants have no right, as stockholders of an anonymous corporation, to set forth an action against the Government of Venezuela to obtain an award for damages caused by the annulment of a concession granted by said Government to a citizen of Venezuela and transferred afterwards to an anonymous corporation domiciled in Venezuela, and whose rights, properties, and titles are legally represented by its own manager during the existence of the corporation, or by its liquidators if the same has been put in liquidation.

The contract celebrated in April, 1897, between the minister of public works and Joaquín Valbuena Urquinaona, a citizen of Venezuela, had for its object the construction of a wooden wharf and other works in the port of Encontrados, on the river Zulia, in the State of Zulia. It was transferred two years after to an anonymous corporation called "Trasportes en Encontrados" formed by Venezuelan stockholders with Venezuelan capital, and the price of acquisition of the rights of the grant was paid by the corporation to the owner of the concession from its own funds.

The corporation appointed in its first general assembly of shareholders a board of directors and a manager, all Venezuelans, and chose as its domicile

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the city of Maracaibo, capital of the State of Zulia, being, consequently, a domestic corporation of Venezuela.

By the deed of the aforesaid transfer, which was recorded in the subsidiary office of the register of Maracaibo on the 22d of April, 1899, the corporation assumed all rights, exemptions, and privileges arising from the grant, and bound itself to the terms of the article 16 of the contract, which reads as follows:

> That any doubt or dispute arising from the interpretation of this contract should be decided by the courts of the Republic according to its laws, and they could not in any case be a motive for an international claim.

Can it be admitted as belonging to Kunhardt & Co., shareholders of the domestic corporation " Trasportes en Encontrados," the right to claim damages arising from the breach of a contract that does not belong to them, but which is the exclusive property of the corporation " Trasportes en Encontrados?"

Being the fundamental fact for this claim the wrongful annulment of a grant, the claimants necessarily must be the owners of such grant, and said owner, or his legal representative, is the only person entitled to claim restitution, indemnity, or compensation for the value of the property which has been taken from him. There is only one grant; the agreement between the Government of Venezuela and the grantee originates juridical ties only between the two contracting parties. That grantee was originally a Venezuelan named Joaquín Valbuena Urquinaona. Subsequently all the rights and privileges of said contract were transferred and assigned Frederico Evaristo Schemel, and on or about December 16, 1897, said Schemel transferred and assigned all his rights and privileges under said contract and concession to Bernardo Tinedo Velasco. This Tinedo Velasco assigned to the corporation " Trasportes en Encontrados " all his rights and liabilities. By this last transfer the moral person, also a Venezuelan, named " Compañía Anónima Trasportes en Encontrados," became the only owner of said rights, and this fact was expressly notified to the Government of Venezuela, who gave its authorization and conformity to the transfer by a decision of the department of public works of March 14, 1899.

The juridical ties created by the original contract between the Government of Venezuela and Joaquín Valbuena Urquinaona were, by the last transfer, finally established between the said Government and the " Compañía Anónima Trasportes en Encontrados." No juridical ties of any kind exist between Messrs. Kunhardt & Co. and the Venezuelan Government arising from the aforesaid contract.

The interest acquired by Kunhardt & Co. by investing their money in shares of the corporation is a private transaction between them and the corporation and does not create any juridical ties between the Government of Venezuela and them as shareholders during the existence of the corporation.

The shareholders of an anonymous corporation are not co-owners of the property of said corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property and values of the corporation when this one makes an adjudication as a consequence of its final dissolution or liquidation.

The Venezuelan Commercial Code in article 133 expressly determines that an anonymous corporation constitutes a juridical person distinctly separated from its shareholders. Article 204 of the same code provides that when the managers find that the social capital has reduced one-third they should call a general meeting of shareholders to decide whether the corporation ought to liquidate, and in section 2 of the same article it is provided that if the reduction of a capital is of two-thirds the corporation shall be put necessarily in liquidation,

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if the shareholders do not prefer to renew the capital or to limit the social capital to the existing funds, provided it would be sufficient to fill the object of the corporation.

The documents in evidence do not show any proof that the corporation "Trasportes en Encontrados" has been put in liquidation, neither has it dissolved in accordance with the commercial law and the statutes of the same corporation. The representation of all its rights, and its juridical person remain the same as they were at the last general special meeting held on January 19, 1901, being that representation exercised by its board of directors. At the same meeting the shareholders limited their action to intrust the managers of the company with the formulation of a protest against *the annulment of the contract, to leave in safety the integrity of its rights and for all the prejudices and damage caused to the company, its stockholders, and others connected with it, in order to make them of value in the manner and at the time they believe opportune.*

Nothing appears to have been done by the managers or board of directors of the corporation "Trasportes en Encontrados" to liquidate the same nor to adjudicate any part of the corporation's property to the shareholders.

The integrity of the rights of the corporation remain in the corporation itself, and its exercise is specially and legally intrusted, by the common law, by the provisions of the commercial code, and by the social contract, to the manager and the board of directors. Therefore the said rights can not be exercised by any other person than the directors of the corporation.

Messrs. Kunhardt & Co. have no legal capacity to stand before this Commission as claimants for damages originated by a breach of a contract whose rights and obligations are only mutually established between the Government of Venezuela and the corporation "Compañía Anónima Trasportes en Encontrados."

The case of the claim of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation which was created under the laws of Salvador, under the name of "El Triunfo Company (Limited)," and the other one of the Delagoa Bay Railway Company,[1] to which the attention of the Commission has been called by the honorable agent of the United States, have been carefully examined, and they do not present any likeness to the present claim.

By the aforesaid considerations I consider that this first claim for damages, amounting to $ 46,875, must be disallowed, without prejudice to the rights of the corporation "Compañía Anónima Trasportes en Encontrados," its stockholders, and others connected with it.

In reference to the second claim, amounting to $ 22,847.71, for damages to the estate "El Molino," owned by Messrs. Kunhardt & Co., I entirely agree with the honorable Commissioner for the United States, in the appreciation of the evidence and the responsibility of the Government of Venezuela.

An award is therefore agreed to in favor of Kunhardt & Co. for the sum of $ 13,947 United States gold.

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